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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Ohio Senator Richard T. Finan,

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNATTENDED DISPLAY ON GOVERNMENT PROPERTY OF A PURELY RELIGIOUS SYMBOL, SUCH AS A LARGE, LATIN CROSS, DIRECTLY IN FRONT OF A SEAT OF GOVERNMENT, SUCH AS THE OHIO STATEHOUSE, VIOLATES THE ESTABLISHMENT CLAUSE, EVEN IF SUCH DISPLAY IS SPONSORED BY A PRIVATE GROUP IN A PUBLIC FORUM?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 30 F.3d 676 (6th Cir. 1994) and is reprinted in the Appendix to the Petition for Writ of Certiorari ("App.") at A1-A12. The Sixth Circuit's opinion affirmed the December 21, 1993 Order and Opinion of the United States District Court for the Southern District of Ohio. The District court's opinion is reported at 844 F. Supp. 1182 (S.D. Ohio 1993) and is reprinted at App. A13-A26. The Report and Recommendation of the Administrative Hearing Examiner, adopted in full by the Capitol Square Review and Advisory Board, is reprinted at App. A27-A37.

The unreported opinion of the Sixth Circuit denying Petitioners' request for an emergency stay of the district court's injunction pending appeal is reprinted at App. A40-A42. The in-chambers opinion of Justice Stevens, sitting as Circuit Justice, denying Petitioners' request for an emergency stay of the district court's injunction pending appeal is reported at 114 S. Ct. 626 (Stevens, Circuit Justice 1993) and is reprinted at App. A38-A39.

STATEMENT OF JURISDICTION OF THE COURT

The decision of the Court of Appeals for the Sixth Circuit was entered on July 25, 1994. *See* App. A1. The petition for writ of certiorari was filed on October 24, 1994, and was granted on January 13, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Respondents in this action, the Knights of the Ku Klux Klan (Ohio Realm) and two of their officers, brought this suit originally against the Capitol Square Review and Advisory Board, its executive director, spokesperson, and chairperson. Joint Appendix (J.A. 22-23). The lawsuit sought in effect to compel the State of Ohio to allow Respondents to erect a large, unattended Latin cross directly in front of the Ohio Statehouse during the Christmas season, between December 8, 1993 and December 24, 1993. (J.A. 26). Respondents openly acknowledged that their purpose in seeking to erect the display at this location was to erect "a symbol for our Lord, Jesus Christ" (J.A. 173) in furtherance of their more general purpose to "establish a Christian government in America." (J.A. 144-147).

2. The Capitol Square is owned by the State of Ohio and located in downtown Columbus. It is the site of Ohio's state capitol building, also known as the Ohio Statehouse, which is a large rectangular building that centers the Capitol Square. The Ohio Statehouse, which is a distinctive example of Greek Doric architecture, is topped by a large rotunda. For well over a century, it has housed both chambers of the Ohio General Assembly as well as the offices of the Ohio Governor and other statewide officeholders. (J.A. 96-97). The Ohio Statehouse is the dominant feature of the Capitol Square, and it is plainly and unavoidably visible from every vantage point on the Capitol Square. *See* App. A43 (photograph). The District Court held in this case that the Capitol Square is a public forum. *See* App. A18.

For the past several years, the State of Ohio has allowed certain holiday seasonal displays to be placed on the Capitol Square for limited periods during the month of December. (J.A. 98). The State's traditional policy is to

allow a broad range of speakers and other gatherings of people to conduct events on the Capitol Square. (J.A. 98). These displays are generally an exception to that policy because they are unattended structures. The holiday seasonal displays permitted by the State in the past have included a Christmas tree and a menorah. (J.A. 98).

On November 18, 1993, the Capitol Square Review and Advisory Board, which is authorized by law to regulate the uses of the Capitol Square, voted not to permit unattended displays on the Capitol Square during December of 1993. (J.A. 98). That vote was later declared invalid, and on November 23, 1993, the Board voted to approve displays of a Christmas tree and menorah. (J.A. 98-99). The State displayed its own Christmas tree, and a permit application to erect a menorah on the Capitol Square from December 8-16, 1993, which was explicitly stated to be a "seasonal display," was granted. (J.A. 99).

3. On November 29, 1993, Respondents applied for a permit to display a cross on the Capitol Square from December 8-24, 1993. (J.A. 99). The application described the type of event as being to "erect a cross for Christmas." (J.A. 99). Executive Director Keller denied the application on December 3, 1993, "upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts." (J.A. 99). Respondents later clarified that they sought to erect a cross in the style of a Latin cross,[1] about ten feet high and six feet

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[1] "Latin cross" is the proper term for any "cross whose base stem is longer than the other three arms." *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271, *cert. denied*, 479 U.S. 961 (1986) (affirming preliminary injunction against display of lighted Latin cross on top of city fire department

across and accompanied by a suggested disclaimer open to negotiation. (J.A. 100).

On December 9, 1993, Respondents filed an administrative appeal of this action to the full Board; the appeal was perfected on December 13, 1993. (J.A. 100-101). On December 17, 1993, a state administrative appeal was conducted by a hearing examiner who took evidence and heard argument from both sides. On December 21, 1993, the administrative hearing examiner issued a report and recommendation which found that the initial denial of a permit to Respondents was proper. App. A27. The hearing examiner held, among other things, that whereas holiday seasonal symbols have by virtue of that association taken on "cultural significance extending well beyond the religious sphere," the Latin cross "is generally regarded as having a purely sectarian purpose (*i.e.*, to advance or endorse the Christian religion)." App. A34-A35. For that reason, the display of a Latin cross directly in front of the Ohio Statehouse, unlike the display of a Christmas tree or a menorah, was held to violate the Establishment Clause. App. A36. The Board unanimously adopted this report and recommendation as its own final ruling later that day. App. A16.

4. In the meantime, on December 15, 1993, Respondents filed this lawsuit in District court, asserting that the denial of their application for permit to erect a cross violated their constitutional right of free speech. (J.A. 27). The court set the matter for hearing on December 20, 1993, and consolidated the hearing on Respondents' motion for a preliminary injunction with a trial on the merits. At the

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building during Christmas season because it would violate the Establishment Clause).

close of this hearing, the court deferred its ruling pending the outcome of the state administrative appeal process. Once that process was completed on December 21, 1993, the court granted a permanent injunction requiring Petitioners to approve a permit for Respondents to display a cross on the Capitol Square through December 24, 1993. App. A26.

In its ruling, the District Court considered whether Respondents' display of a large, unattended Latin cross directly in front of the Ohio Statehouse would constitute an impermissible "endorsement" of religion under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as subsequently interpreted and applied in such "holiday seasonal display" cases as *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). On the basis of a recent *en banc* decision by the Sixth Circuit Court of Appeals that addressed essentially the same issue, *Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993) (en banc), the District Court held that the unattended religious display in this case would not constitute an impermissible endorsement of religion so as to violate the Establishment Clause. App. A7-A8.

5. Immediately after the District Court issued its ruling, Petitioners moved for a stay pending appeal, which the court denied. Petitioners filed a Notice of Appeal to the Sixth Circuit on the same day -- December 21, 1993 -- and filed a motion for an emergency stay of the injunction pending appeal, which the Sixth Circuit denied on December 22, 1993. App. A40. Petitioners then filed an emergency application for a stay of injunction with Circuit Justice Stevens, which was denied on December 23, 1993. App. A38.

6. Respondents erected a cross on the Capitol Square sometime during the night of December 21, 1993, and it was displayed there the following day until it was apparently vandalized. The cross was displayed by itself in the middle of the lawn directly in front of the Ohio Statehouse, *see* App. A43 (photograph), located at some distance from the Christmas tree.[2] On December 22, 1993, Petitioners received yet another application from a group of Christian ministers, who sought to erect twenty more Latin crosses in front of the Ohio Statehouse. Petitioners believed themselves obligated, by the force of the District Court's ruling, to grant this further application, and thereafter numerous other crosses were erected and displayed in the same vicinity on December 23-24, 1993. (J.A. 60) (Appendix to Brief In Opposition To Writ Of Certiorari p. RA 31 ("Opp. App.")).

7. On appeal, the Sixth Circuit affirmed the District Court's ruling. App. A1. The Sixth Circuit adhered to its recent *en banc* decision in *Americans United*, which "held that a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause." App. A8. The court focused in particular on the nature of the display and the nature of the forum. It essentially held that because this display was privately sponsored, it did not matter what was contained in the display -- for example, a Latin cross in this case as opposed to a menorah in cases like *Americans United* and *County of Allegheny*. Because this display was to be located in a public forum, moreover, it did not matter what kind of location was to exhibit the display -- for example, the Ohio Statehouse in this case as opposed to a public park in cases

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[2] The menorah had been removed almost a week earlier, when that permit expired on December 16, 1993.

like *Americans United* and *Lynch*. The Sixth Circuit thus determined that a reasonable observer could not conclude that the State of Ohio endorsed Christianity after viewing a large, unattended Latin cross standing directly in front of the Ohio Statehouse because "'truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer.'" App. A9 (quoting *Americans United*, 980 F.2d at 1553) (emphasis in original). On this ground, the Sixth Circuit held that Respondents' display of a Latin cross directly in front of the Ohio Statehouse did not constitute an impermissible endorsement of religion under the Establishment Clause.

SUMMARY OF ARGUMENT

Displays of purely religious symbols at the seat of government, such as the large solitary and unattended Latin cross placed directly in front of the Ohio Statehouse in this case, violate the Establishment Clause of the First Amendment.

A purely religious symbol, such as a Latin cross, the ultimate sectarian symbol of Christianity, conveys a clear message of religion. *See American Civil Liberties Union v. City of St. Charles*, 794 F. 2d 265 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986). At the same time, the symbol of the seat of government, in this case the Ohio Statehouse, conveys a clear message of government authority. *Kaplan v. City of Burlington*, 891 F. 2d 1024 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). The conjunction of the two communicates powerfully to an observer that the message conveyed by each symbol comes from the same source -- the government. *Id.*

In most circumstances, an observer can easily identify those responsible for speech: the speaker at the microphone,

the group chanting a slogan, the person holding a sign or passing out brochures. But when speech is conveyed by an unattended display, the author of the speech is not readily ascertainable and usually is perceived by most reasonable observers to be the owner of the property on which the display stands.

The Establishment Clause protects against religious messages bearing the government's imprimatur. *Widmar v. Vincent*, 454 U.S. 263 (1981). The juncture of the cross and the government building in an unattended setting creates the danger against which the Establishment Clause guards.

The Court has not addressed whether a union of church and state is legally permissible if it occurs in a public forum. The Sixth Circuit adopted a *per se* rule that, because a display is privately sponsored in a public forum, there can never be a misperception of the message. But nothing in the Court's precedents removes, for Establishment Clause purposes, the obligation of a court to determine the nature of the message being sent and received. The fact that the message is delivered in a public forum does not give the government the right to advocate religion. Nor may it permit a private party to proffer speech which is likely to be perceived as government speech endorsing religion. Public forum or no public forum, government may not throw its weight behind sectarian evangelism, nor may it permit a private party to create the impression that government supports religion. But just such an impression is created when an unattended, purely religious symbol, such as the Latin cross, is positioned with the state capitol as its backdrop.

The court below incorrectly held that one part of the First Amendment -- the free speech clause -- always trumps another part of the First Amendment -- the Establishment

Clause -- when speech is uttered in a public forum. Under such rationale, no inquiry ever need be made whether, under the circumstances of the case, the speaker in the public forum appears to be the government and the speech appears to be endorsement of religion. If the Framers had intended such power of the Free Speech Clause, one would think that they would at least have placed it before the Establishment Clause.

The Court's cases dealing with holiday seasonal displays offer two tests for evaluating the issues in the instant case. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). Each test attempts to strike a proper balance so that government neither advances nor inhibits religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). This includes not preferring the religious practices of one group at the expense of other groups, or even religious non-adherents. *County of Allegheny*.

The union of an isolated and unattended religious icon and the seat of government upsets this constitutional balance. *Kaplan; Smith v. County of Albemarle, Va.*, 895 F. 2d 953 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 74 (1990). There is a significant risk that observers of the message conveyed by this union will perceive it as emanating from the government. For that reason, the unattended display in this case violates either test previously established by the Court.

Neither the Court's opinions nor reasoning in its "equal access" line of cases alters this conclusion. The equal access cases dealt with whether the message conveyed by government when allowing or denying access to government property communicates government preference for or intolerance to religion. *Widmar*; *Board of Education of Westside Community Schools v. Mergens*, 492 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free*

School Dist., ___ U.S. ___, 113 S. Ct. 2141 (1993). The Court concluded in the context of those cases that equal access was necessary to convey government neutrality toward religion. Although in those cases the Court found no significant risk of misperception of the message conveyed by government, the inquiry was directed toward the perception of the listener or observer under each set of circumstances. *See generally id.*

In stark contrast, the Sixth Circuit's analysis in this case ceased once the court established that speech was uttered in a public forum by a private non-governmental party. The court below incorrectly limited its analysis to a factual determination of who spoke, rather than, in the circumstances presented, who a "reasonable observer" might rationally conclude spoke.

Government may make distinctions in speech if compelling interests exist for doing so. *Lamb's Chapel.* Here government has a compelling interest to avoid violating the Establishment Clause. A complete prohibition on purely religious symbols at the seat of government is the only, and, therefore, the most narrowly tailored way to accomplish that goal. Disclaimers are entirely ineffectual and themselves create the risk of government entanglement with religion.

ARGUMENT

I. A PURELY RELIGIOUS SYMBOL, SUCH AS A LARGE UNATTENDED LATIN CROSS, CLOSELY ASSOCIATED WITH THE SEAT OF GOVERNMENT, CONVEYS AN UNMISTAKABLE MESSAGE OF GOVERNMENT IMPRIMATUR OF RELIGION.

In the Court's line of seasonal holiday display cases, the Court has confronted the fact-specific nature of each case. That inquiry has been criticized as dealing with "jurisprudence of minutae". *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). The Court need not engage in the same analysis in this case. Any isolated, unattended display of a purely religious symbol at the seat of government violates the Establishment Clause. The combination of symbols representing church and state conveys too powerful a message that can easily be misunderstood, especially in a context where an observer has no readily identifiable source to which to attribute the message, other than government itself.

Symbols elicit direct and immediate emotions due to their strong and enduring meaning. A religious, especially sectarian, symbol, no matter what the particular physical setting may be, conveys the unmistakable message of that symbol's religious doctrine. The Latin Cross is a powerful example of just such a symbol: ". . . the cross is a symbol par excellence of Christianity itself as well as of Christ its head. ... [T]he cross is endowed with transcendent significance." Anderson Affidavit ¶¶ 8 and 11 (J.A. 131-

132). No ambiguity about the symbolic meaning of the Latin cross exists.

Similarly, a seat of government such as the Ohio Statehouse stands inexorably as a symbolic "metaphor for government." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987). When the universal symbol of Christianity is placed directly in front of the Ohio Statehouse, it is inseverably linked to the symbolic center of government. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943), the Court recognized the inescapable association between various symbols:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes, *the church speaks through the Cross*, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas *just as religious symbols come to convey theological ones*. (emphasis added).

The meaning of a symbol must be viewed in the overall context of its setting. "The context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence v. Washington*, 418 U.S. 405, 410 (1974). Scholars have observed that "people's responses to a symbol will be

contingent upon their assessments of the circumstances of its usage." C. Elder & R. Cobb, The Political Uses of Symbols 57 (1983). This is especially true if the symbol is visually linked to other symbols. "When a particular symbol is used in conjunction with several other symbols, they may all become linked in the eyes of the general public." *Id.* at 77.

Respondents in the instant case were permitted, based upon the lower courts' decisions, to erect a Latin cross at the seat of secular government. Just as the Latin cross conveys a powerful message of religion, the Ohio Statehouse conveys a powerful message of governmental authority. *See American Jewish Congress*, 827 F.2d at 128 (discussing the symbol of city hall); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029-30 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) ("the park involved is not any city park, but rather City Hall park. This Park is bounded on the east by City Hall, the seat and the official symbol of Burlington city government. . . ."). And, just as the Latin cross is the most recognizable symbol of Christianity, the Ohio Statehouse is the single most visible and recognizable symbol of government in the State of Ohio. Any association of the two threatens to blur the distinction between church and state because the observer will view it as government's sponsorship of religion.[3]

The Establishment Clause protects against "any imprimatur of state approval of religious sects or practices."

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[3] The Latin cross was not erected as part of a holiday seasonal display but stood majestically by itself in the middle of the front lawn of the Capitol Square. App. A43. Respondents' application specifically requested this location which was apart from and a distance away from where the Christmas tree and menorah were located. (J.A. 43).

Widmar v. Vincent, 454 U.S. 263, 274 (1981). The combination of the cross and government, in a context where the latter is perceived to support the former, creates this danger.

It has long been recognized that speech may take many forms, including such nonverbal forms as symbolic displays. Not all forms of speech, however, have equivalent impact. Sometimes, such as in this case, speech must be evaluated not only on the basis of its content, but also as to the identity of the speaker. A determination of authorship often is directly determinable from the columnist, the television commentator, the rally speaker, the sign holder. All can be noted directly by the reader or the listener. But in the case of an unattended display, the source of the communication must be inferred. In the absence of clear and direct information to the contrary, an observer reasonably perceives the message conveyed by an unattended display as the message of the landowner.

The grounds of the Ohio Statehouse, in addition to being a public forum, as observed by the Sixth Circuit, are home to statues of historical figures important to Ohio and Columbus. As the record reflects, these grounds have previously housed only two other temporary, unattended displays -- a secular and pluralistic seasonal display and a chart showing the progress of the community's United Way campaign. Observers of these unattended displays correctly will perceive the message conveyed by these symbols as messages supported and approved by the State of Ohio.

The Sixth Circuit declared that since the unattended display of the Latin cross was presented in a public forum, only a "hypothetical dolt" would not realize this message came from private citizens, not the government. Because government can and does convey symbolic unattended

messages from the very grounds upon which private speech rallies frequently occur, however, the mere fact that private speech is permitted does not remove the inference that an unattended display on government property is government endorsed.

A battery of cases has held that the display of a cross on government property "dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be." *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986). *See Gonzales v. North Township of Lake County*, 4 F.3d 1412, 1423 (7th Cir. 1993) (court held that the cross "does not bear secular trappings sufficient to neutralize its religious message," and indeed "does not convey any secular message, whether remote, indirect, or incidental").

For this reason, courts regularly and persistently have granted injunctions and other proper relief when an Establishment Clause challenge is raised against an attempt by anyone to display a Latin cross on government property. *See, e.g., Mendelson v. City of St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989) ("no federal case has ever found the display of a Latin cross on public land by a state or state subdivision to be constitutional"); *American Civil Liberties Union v. Mississippi General Services Admin.*, 652 F. Supp. 380, 384-85 & n.2 (S.D. Miss. 1987) ("in no other federal case either before or since *Lynch v. Donnelly* has the public display of a cross by a state or subdivision thereof been found to be constitutional").

This judicial result has been the same whether the Latin cross on government property is large, *see, e.g., Jewish War Veterans v. United States*, 695 F. Supp. 3, 5 (D.D.C. 1988) (65' illuminated cross serving as war

memorial on Marine Corps base; permanent injunction granted); *Mendelson*, 719 F. Supp. at 1066 (12' cross on city water tower; injunction granted), medium-sized, *see, e.g., Libin v. Town of Greenwich*, 625 F. Supp. 393, 394 (D. Conn. 1985) (3' x 5' illuminated cross on firehouse; preliminary injunction granted), or quite small, *see, e.g., Harris* v. *City of Zion*, 927 F.2d 1401, 1402-04 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3054 (1992) (Latin cross appeared in one quadrant of municipal corporate seals; permanent injunction granted); *Friedman v. Board of County Commissioners*, 781 F.2d 777, 779 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986) (Latin cross appeared on county seal; injunction granted).

In addition, this has been true even when the display of the Latin cross on government property has existed for many years, *see, e.g., American Civil Liberties Union v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1101 (11th Cir. 1983) (cross in state park originally dated back almost 30 years; permanent injunction granted); *Jewish War Veterans*, 695 F. Supp. at 5 (cross on Marine Corps base more than 22 years; permanent injunction granted), and even where it was privately sponsored. *See Gonzales*, 4 F.3d at 1422-23 (crucifix in public park for more than 40 years; permanent injunction granted). It is this judicial recognition of the inability of an observer to separate the state from the message of the Latin cross that undermines the decision below.

II. THE ESTABLISHMENT CLAUSE MAY REQUIRE A FINDING OF THE UNCONSTITUTIONALITY OF AN UNATTENDED RELIGIOUS DISPLAY, EVEN IF SUCH DISPLAY STANDS IN A PUBLIC FORUM

The decision of the court below is sweeping in scope, creating a *per se* rule obviating the need to examine how the message is perceived by a reasonable observer. The lower court focused not on the risk that the government's message will be misperceived, but only on the public nature of the forum in which the message is relayed.

The nature of a public forum guarantees broad communication. The Court first recognized the concept of the public forum in *Hague v. CIO,* 307 U.S. 496 (1939). The Court observed that streets and parks in this country universally have been considered public forums:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515. *See also Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S. ___, 113 S. Ct 2131, 2146 (1993) ("parks and sidewalks are traditional public fora"); *International Soc'y for Krishna Consciousness v. Lee*, ___ U.S. ___, 112 S. Ct. 2711, 2717 (1992) (Kennedy, J.,

concurring) ("types of property that we have recognized as the quintessential public forums are streets, parks, and sidewalks").

In these traditional public forums, as well as in so-called "designated" or "limited" public forums, the government may not prohibit all communication. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 470 U.S. 37, 45 (1983) ("[I]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.") (emphasis added).

The public forum doctrine by itself, however, does not require the State of Ohio to permit the erection of *any* symbol upon government property characterized as a public forum.. Just as "[t]he principle that government accommodation of the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause", *Lee v. Weisman*, ___ U.S. ___, 112 S. Ct. 2649, 2655 (1992), the public forum doctrine should not be permitted to "swallow up" the Establishment Clause. *Kaplan*, 891 F.2d at 1029. That a message is delivered in a public forum does not give government the right to advocate religion. Nor may it permit a private party to proffer speech that is likely to be perceived as government speech endorsing religion. Public forum or not, government may not lend its support to a particular religious message or allow private parties to manipulate government for that purpose.

In *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846 (1992), Justice Kennedy squarely recognized the inherent clash between competing constitutional doctrines:

> The same use of the compelling interest test is adopted today, not to justify or condemn a category of suppression but to determine the accuracy of the justification the State gives for its law. There is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for an accommodation of another constitutional right.

Id., 112 S.Ct. at 1859 (Kennedy, J., concurring). And just as competing doctrines were balanced in that case, they must be balanced here. The Sixth Circuit's holding does not balance competing doctrines. It allows one to trump the other.

A. The Broad Ruling Of The Sixth Circuit Court Of Appeals Is Inconsistent With The Court's Precedent.

Relying in large part on its decision in *Americans United for Separation of Church and State v. Grand Rapids*, 980 F. 2d 1538 (6th Cir. 1993) (en banc), the court below held that a privately sponsored unattended religious display erected on Capitol Square, a public forum that is a part of the Ohio Statehouse grounds, can *never* constitute an impermissible establishment of religion. But even the Sixth Circuit recognized in *Americans United* that a fact-specific approach must be utilized:

> ... when applying the endorsement test to this case, we must examine all the relevant facts, consider carefully the amount of weight to give each fact, and be careful to treat religious

> displays fairly. We must avoid hasty reliance on partial similarities between the facts at hand and those found in other cases. Even if this display appears similar in some respects to others that have been found unconstitutional in the past, other factors, unique to this case, may require us to uphold [the challenged government action here].

American United, 980 F.2d at 1544. *See Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) ("[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion").

In reaching its decision, however, the lower court below failed to engage in an evaluation of "all the relevant facts." *Id.* Rather, the court relied on only two facts from its decision in *Americans United* and considered those two facts to be conclusive: (1) Respondents' display would be privately sponsored and (2) it would be located in a public forum.

That approach is inconsistent with the Court's precedents. In *County of Allegheny*, the Court upheld the display of a privately sponsored menorah that was placed next to a Christmas tree on government property. The Court did not hold such display proper simply because it was a private display, even though the government had created an open forum for it. Rather, the Court engaged in a fact-specific analysis to determine that the display of the menorah did not create the danger of misperception against which the Establishment Clause guards.

Similarly, the Court in its "equal access" line of cases has not focused exclusively on the public nature of the

forum. Thus, in *Widmar*, the Court found that no Establishment Clause violation existed because the university students there would not perceive the government as sponsor of religion. The Court, however, still engaged in an analysis of the nature of the message conveyed and received, rather than simply the forum in which it was expressed. "[T]he nature of the location as a public forum is but one factor to consider in determining whether the context of the display suggests government endorsement of religion." *Kaplan*, 891 F. 2d at 1029.

Moreover, the Sixth Circuit's test is unworkable for it has no limit. It would make no difference under the lower court's test whether the symbol at issue was a plain unadorned cross or a crucifix. Nor, under the Sixth Circuit's test, would the speaker's identity make any difference: government officials, as private citizens, could sponsor religious displays in front of a government building for purposes in conflict with the Establishment Clause.

To be sure, the record reflects the presence of a disclaimer of government involvement posted at the base of the cross. Under the Sixth Circuit's test, however, the disclaimer was irrelevant - all that mattered was the assumed widespread recognition of Capitol Square as a public forum. The Sixth Circuit would have upheld the constitutionality of the display of the Latin cross regardless of the presence of a disclaimer.

B. The Second And Fourth Circuits, Not The Court Below, Have Struck The Appropriate Balance Between The Competing Doctrines Of Free Speech And The Establishment Clause.

As the Sixth Circuit explicitly acknowledged, its position is in direct conflict with that of the Fourth and Second Circuits: "We decline the invitation to follow several cases cited by the plaintiffs." *Americans United*, 980 F. 2d at 1550-51 (discussing *Smith v. County of Albemarle, Va.*, 895 F. 2d 953 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 74 (1989), and *Kaplan*, 891 F. 2d 1024).

The Second and Fourth Circuits' rulings in *Kaplan* and *Albermarle County* strike the appropriate balance between the competing doctrines of Free Speech and the Establishment Clause. Specifically, in *Albermarle County*, the Fourth Circuit struck down as an impermissible establishment of religion the display of a creche by the local jaycees. There, the creche was displayed in a traditional public forum, the front lawn of a county office building. Analyzing facts virtually identical to the present case, the court emphasized the specific location the creche was to occupy by stating:

> Finally, and most significantly, the creche was displayed *in the context of a government site*. That is, one could not readily view the creche without also viewing the trappings and identifying marks of the state. This visual association was, in the district court's view, unmistakable and impossible to sever.

Id. at 955-56. (emphasis added).[4]

Thus, the court explicitly recognized the inescapable associational link between an unattended religious display and a government building. The reasonable observer would naturally perceive that such a display, located directly in front of a building which houses the very offices of its government leaders, appears to stand with the "stamp of government approval". *American Jewish Congress*, 827 F.2d at 128.

Similarly, the Second Circuit in *Kaplan* found that a private group's unattended, solitary display of a large

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[4] The Fourth Circuit affirmed the decision of the district court, which emphasized the importance of the location and nature of the display:

> In part, the message of endorsement arises because of the symbolic embrace created by the location of this creche ...
>
> It is important to note that this creche . . . is privately owned and privately maintained. Certainly, that serves to undercut somewhat the connection between the government and the display. However, that distancing or disengagement between religious display and government presence which is entailed because the creche is privately-owned is minimal in comparison with the strong visual association between church and state produced by the symbolic embrace.

Smith v. Lindstrom, 699 F. Supp. 549, 561-62 (W.D.Va. 1988), *aff'd*, 895 F. 2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990).

menorah in the public forum of City Hall Park, located directly in front of the seat of the Burlington city government, violated the Establishment Clause. The court in *Kaplan* rejected the argument adopted by the court below -- "that the [appellees] have an absolute constitutional right to engage in symbolic expressive conduct in a public forum such as City Hall Park" -- because otherwise "the public forum doctrine would swallow up the Establishment Clause." *Id.*, 891 F. 2d at 1029. In so holding, the *Kaplan* Court went to great lengths to distinguish a symbol for the Christian faith, standing alone and unattended, from a live speaker. Specifically, the Second Circuit stated:

> Thus, while previous, apparently noncontroversial, uses of the Park suggesting religious activity could be clearly tied to a speaker, the display of this unattended, solitary, semi-permanent symbol could not; and in the absence of a live speaker to whom responsibility could be attributed, the City was perceived as fulfilling the role of sponsor.

Id. at 1030.

In a more recent decision, the Second Circuit reaffirmed its adherence to the reasoning of *Kaplan*, again in a case involving a private organization's attempt to display an unattended menorah directly in front of the Burlington City Hall. *See Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F. 2d 198 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3026 (1992) (court rejected private organization's proposal to move the menorah further away from City Hall and place it near two signs that sent a secular holiday message).

Application of the Second and Fourth Circuit's reasoning and rationale in *Kaplan*, *Albermarle County*, and *Chabad-Lubavitch of Vt.* is entirely appropriate in light of the "unique circumstances and context" of this case. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). Here, the large, unattended Latin cross located directly in front of the Ohio Statehouse, on government property, conveyed an unmistakable message of government support. Moreover, the record in the instant case indicates that Respondents' intent was to erect the Latin cross as a monument to "Our Lord, Jesus Christ" (J.A. 173), and to "establish a Christian government in America." (J.A.144-147). Respondents certainly recognized the powerful message communicated by a Latin cross located on Capitol Square because they went to great lengths to "place[d] the government's weight behind an obvious effort to proselytize on behalf of Christianity." *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring and dissenting) (finding the placement of a large Latin cross on government property runs afoul of the Establishment Clause).

III. THE DISPLAY OF A SOLITARY UNATTENDED RELIGIOUS SYMBOL UNASSOCIATED WITH THE HOLIDAY SEASON AT THE SEAT OF GOVERNMENT VIOLATES THE ESTABLISHMENT CLAUSE UNDER ANY TEST PROPOSED BY THE COURT.

The Religion Clauses of the First Amendment are simply written, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," yet difficult to apply. *See Lynch*, 465 U.S. at 678 ("The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application.").

When analyzing the appropriateness of religious displays sponsored or permitted by the government, the Court has applied the "endorsement" test. *County of Allegheny*, 492 U.S. at 592-94. Alternatively, some members of the Court have advocated application of a "proselytism" test. *See id.* at 659-63 (Kennedy, J., concurring in the judgment in part and dissenting in part). Underpining both tests is the requirement of governmental neutrality toward religion. An unattended Latin cross, unassociated with a specific holiday season and displayed by itself at the very seat of state government, violates the Establishment Clause under any of the tests articulated by the Justices of the Court.

A. Neutrality

It is "settled law" that government must remain neutral toward religion. *Weisman*, 112 S.Ct. at 2667-68 (Souter, J., concurring) ("[W]e have consistently held the [Establishment] Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others."); *See also Board of Education of Kiryas Joel Village School District v. Grumet*, ___ U.S.___, 114 S.Ct. 2481, 2487 (1994) (Souter, J) (Establishment Clause requires that the state "favor[ ] neither one religion over others nor religious adherents collectively over nonadherents"); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) (Establishment Clause commands that a state "pursue a course of 'neutrality' toward religion."). Commentators examining the history of the Establishment Clause also conclude that the clause was meant to promote governmental neutrality. "The principle that best makes sense of the establishment clause is the principle of the most nearly perfect neutrality toward religion and among religions." Douglas Laycock, *Nonpreferential Aid to Religion: A False*

Claim About Original Intent, 27 William and Mary L. Rev. 875, 922 (1986) (hereinafter "D. Laycock").

This requirement of governmental neutrality is inherent in the second prong of the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which requires that the "principal or primary effect" of challenged government action "must be one that neither advances nor inhibits religion." *Id.* at 612. At a minimum, the principle of neutrality requires that the government not be perceived as "conferring an 'imprimatur of state approval' on religion". *Id.*, at 657 (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting *Widmar,* 454 U.S. at 274). Yet that is the danger here.

A person viewing a display at a place of government associates the display with the government. Respondents' own witness, Joseph Cooper, identified a United Way fund raising display on Statehouse grounds as government support for that cause. (J.A. 161). Similarly, although a Christmas tree conveys a secular message of the holiday season, everyone will perceive it as sponsored by government when erected on government property. The combination of the cross and Capitol Square offends the concept of neutrality, therefore, because the cross either will be misperceived as belonging to the government or supported by it.

B. Endorsement Test

The last time the Court reviewed the constitutionality of religious displays located on public property, it applied the endorsement test previously formulated by Justice O'Connor:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment

> Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

County of Allegheny, 492 U.S. at 593-94 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)) (emphasis added). In *Lynch*, the Court held that a city did not violate the Establishment Clause by including a creche in its annual Christmas display. Although leaving open the question regarding the constitutionality of a public display of "distinctively religious symbols such as a cross," *Lynch*, 465 U.S. at 695 (dissenting opinion), five Justices in *Lynch* "agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *County of Allegheny*, 492 U.S. at 597 (Blackmun, J.).

In the context of this case, the cross communicates nothing other than a purely religious message. It certainly cannot properly be understood to belong as part of a holiday seasonal display. In fact, the Latin cross "is not considered a Christmas symbol as such. It is a symbol of Jesus as the Christ." Anderson Affidavit ¶13 (J.A. 132); *St. Charles*, 794 F.2d at 272 ("the cross is not a traditional Christmas symbol"); *Libin*, 625 F. Supp. at 399 ("the cross has no meaning in the context of the celebration of Christmas except as a religious symbol"). Moreover, the cross, as a religious symbol of Christianity, is of far more universal and recognizable significance than the Nativity scene, for the Latin cross signifies to all who are familiar with the New Testament the crucifixion, resurrection, and salvation of Jesus Christ. *See* Anderson Affidavit ¶¶ 8-11 (J.A. 131-

132); *see also, e.g., Rabun County Chamber of Commerce*, 698 F.2d at 1110 ("the Latin cross is universally regarded as a symbol of Christianity"); *Libin*, 625 F. Supp. at 398 ("There is simply no historical connection of a cross to Christmas except as a symbol of those religions which accept Jesus Christ as a central figure.").

The Court has applied the endorsement test formulated in *Lynch* to strike down government action where only a government message has been sent. Thus, in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the Court invalidated programs in which religious school classes on secular subjects were financed by the public school system and taught by public school teachers. The Court cited Justice O'Connor's concurrence in *Lynch* to present the endorsement test:

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. ....
>
> It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

Id. at 389-90. *See also Texas Monthly v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (tax exemption limited to religious periodicals "effectively endorses religious belief").

Of course, the Court also has upheld a creche in *Lynch* and a menorah and Christmas tree in *County of Allegheny*. But in each of these situations, the religious nature of the message was muted. For example, in *County of Allegheny*, Justice Blackmun considered the particular physical setting of the menorah:

> [T]he relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society.

Id., 492 U.S. at 616 (Blackmun, J.). Justice Blackmun went on to conclude that "the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season" because (1) the Christmas tree is not a religious symbol, (2) the menorah is the symbol for a holiday that has a secular dimension, and (3) the combination of the Christmas tree, menorah and sign proclaiming liberty confirms that displaying the menorah "is not an endorsement of religious faith but simply a recognition of cultural diversity." *Id.*, 492 U.S. at 616-20 (Blackmun, J.).

Justice O'Connor also considered the physical context of the display and formulated the relevant Establishment Clause question as:

> whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs.

Id., 492 U.S. at 632-37 (O'Connor, J., concurring in part and concurring in the judgment).[5] Considering the combined display in its particular physical setting, Justice O'Connor concluded that the display of the secular symbol of the Christmas tree with a salute to liberty and a religious symbol from a contemporaneous Jewish holiday "did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season." *Id.*, 492 U.S. at 635 (O'Connor, J., concurring in part and concurring in the judgment).

In contrast, the Latin cross is an inherently religious symbol, not ordinarily or directly tied to the Christmas holiday season, and has no secular component. The menorah, like the cross, is a religious symbol, but, unlike the cross, also has a secular component because it has become the representative symbol of the Chanukah holiday season. *County of Allegheny*, 492 U.S. at 613 (Blackmun, J.).

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[5] Justice Stevens, joined by Justices Marshall and Brennan, opined that "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property." *Id.*, 492 U.S. at 650 (Stevens, J., concurring in part and dissenting in part). He concluded that the display of the menorah "manifests governmental approval of the Jewish...religion[]." *Id.*, 492 U.S. at 654 (Stevens, J., concurring in part and dissenting in part).

Indeed, it was stipulated in this case that the menorah has both religious *and* secular significance when displayed for the Chanukah holiday season. (J.A. 98).

This point was critical to the Court's reasoning in *County of Allegheny* and was emphasized in each of the decisive opinions addressing holiday displays. *See id.*, 492 U.S. at 618 n.68 ("It does not demean Jewish faith or the religious significance of the menorah to say that the menorah in *this* context represents the holiday of Chanukah as a whole (with religious and secular aspects), just as the Christmas tree in this context can be said to represent the holiday of Christmas as a whole (with *its* religious and secular aspects).") (emphasis in original); *id.* at 626 (O'Connor, J., concurring in part and concurring in the judgment) (in *Lynch*, the "purpose of including the creche in the larger display was to celebrate the public holiday through its traditional symbols, not to promote the religious content of the creche"); *id.* at 665 (Kennedy, J., concurring in judgment in part and dissenting in part) ("The creche and the menorah are purely passive symbols of religious holidays [and] are the traditional symbols of religious holidays that over time have acquired a secular component").

Even when the Latin cross is displayed in conjunction with secular symbols of the holiday season, courts have held that its religious connotation cannot be neutralized by any non-religious associations. *St. Charles,* 794 F.2d at 273; *Mississippi State General Services Admin.*, 652 F. Supp. at 384. The display of the Latin cross, as an inherently religious and indeed a sectarian symbol, instead "'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *County of Allegheny*, 492 U.S.

at 595 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

The endorsement test focuses on the perspective of a "reasonable observer" to determine whether a government action would be perceived as endorsing religion:

> While an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, the constitutionality of its effect must also be judged according to the standard of a "reasonable observer."

Id., 492 U.S. at 620 (Blackmun, J.) (citations omitted); *id.*, 492 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment) ("The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices. . . ."). Implicit in the reasonable observer model is that the perspective must not only be that of the reasonable member of the majority, but must at least be that of a composite of all members of society or of the "reasonable non-adherent." *Id*, 492 U.S. at 620 (Blackmun, J.) (citations omitted). Otherwise, focusing on the perspective only of the reasonable majority member of society would allow "society's insiders to characterize the message the outsiders receive." Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*?, 98 Harv. L.Rev. 592, 611 (1985).[6]

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[6] Taking into account the perspective of the reasonable nonadherent also is appropriate because it was only with the advent of a more religiously pluralistic society that Establishment Clause theory became sharpened and tested. *See* Thomas J. Curry, The

As the majority of the Justices in *County of Allegheny* concluded, "nothing in the context of the display detracts from the creche's religious message" and permitting the display right at the seat of government "sends an unmistakable message that [the state] supports and promotes. . . the creche's religious message." *Id.*, 492 U.S. at 598-600. *See id.*, 492 U.S. at 626 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he creche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community.").[7]

The Latin cross conveys an even more powerful message of sectarian religion than a creche. The Seventh

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First Freedoms: Church and State in America to the Passage of the First Amendment 219 (1986).

[7] Again, although focusing on the unattended cross as the example in this case, any solitary unattended display of a religious symbol in front of the seat of government would suffer the same deficiency. Justices Blackmun and O'Connor indicated that, from the perspective of the "reasonable observer", a menorah standing alone would be improper. *See id.*, 492 U.S. at 616 n.64 (Blackmun, J.) ("The display of a menorah alone may well have [the] effect [of endorsing Judaism]"); *id.*, 492 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment) ("A menorah standing alone at city hall might well send such a message [of endorsement] to nonadherents [of Judaism]."). *See also* D. Laycock at 921 (implying that a cross on government property, even if paid for by private contributions, constitutes government endorsement of religion).

Circuit has said, "we are masters of the obvious, and know that the crucifix is a Christian symbol. We reached a similar conclusion about the Latin cross." *Gonzales*, 4 F.3d at 1418. Consequently, the Latin cross in a government setting fails the endorsement test.

C. Proselytism Test

Four Justices in *County of Allegheny* applied a different test than the endorsement test to uphold the display of the creche as well as the menorah. As formulated by Justice Kennedy, and joined in by Chief Justice Rehnquist, Justice White and Justice Scalia, the "proselytism" test assures that the government does not "coerce anyone to support or participate in any religion or its exercise; and it may not in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.*, 492 U.S. at 659 (Kennedy, J. concurring in the judgment in part and dissenting in part) (quoting *Lynch*, 465 U.S. at 678). *See Weisman*, 112 S.Ct. at 2655 (Court found that the Establishment Clause, at a minimum, requires the government to satisfy the proselytism test).

The proselytism test recognizes that government action violating the Establishment Clause is not limited to direct coercion, but also includes indirect coercion such as the symbolic recognition of religious faith. *Id.*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part). As an example of the type of symbolic recognition that would violate the Establishment Clause, Justice Kennedy posited a city permitting the permanent erection of a large Latin cross on the roof of city hall. The Establishment Clause forbids such a display "because such an obtrusive year-round religious display would place the

government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.*

The Latin cross displayed in Capitol Square conveyed the message of government proselytizing on behalf of Christianity. Because the "prestige, power, and influence of [the state]," *Arlington School District v. Schempp*, 374 U.S. 203, 207 (1963) (Goldberg, J., concurring), is no more manifest than at the seat of government, a Latin cross on the grounds of the state capital will inevitably implicate the state in the advancement of religion in violation of the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

Significantly, two of the cases Justice Kennedy cites in his opinion in *County of Allegheny* supporting this proposition resemble the instant case. In *Rabun County Chamber of Commerce, Inc.*, the Eleventh Circuit had to determine whether the State of Georgia violated the Establishment Clause by permitting a private group to erect an illuminated Latin cross in a state park. Although initially approved by the state, the state stopped sanctioning the presence of the cross, *id.*, 698 F. 2d at 1102 n.4, and the private group remained responsible for constructing and maintaining the display. *Id.* at 1101. Nonetheless, the court held that the State violated the Establishment Clause by allowing a private group to erect a cross in a state park because the private group failed to establish a secular purpose for erecting the cross. *Id.* at 1111.

The other case cited by Justice Kennedy reached a similar result. In *Lowe v. City of Eugene*, 463 P.2d 360

(Ore. 1969), the court held that a city could not issue building permits for a private party to imbed a Latin cross in concrete on city-park property:

> The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol. Accordingly, persons who do not share those beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of the city's endorsement.

Id. at 363. Admittedly, these cases involve permanent structures, whereas the display in the case at bar was meant only to be temporary. But the Constitution may be violated by a temporary as well as a permanent display.[8] Certainly the differerence between a permanent and temporary cross is lost on an Ohioan whose visit to Columbus is brief, but coincides with the temporary display. The person would be equally coerced by the cross on govenment property, whether permanent or temporary. Moreover, if a city cannot erect a Latin cross on the roof of city hall, as discussed by Justice Kennedy, it is difficult to discern the constitutional principle that would allow the same cross to be moved from the roof

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[8] Under the Sixth Circuit's reasoning other groups would presumably be permitted to erect Latin crosses in a continuous fashion, year round, thus creating a display that would be, in effect, permanent. Other church groups did in fact seek permission to erect twenty Latin crosses on the Capitol Square. Based upon the District Court's ruling, Petitioners granted these requests. *See* J.A. 60. (Opp. App. p. RA31) (photograph).

to the front of the building. This would lead to an obsession with constitutional minutia warned against by Justice Kennedy. *County of Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring in judgment in part and dissenting in part). *See also Lynch*, 465 U.S. at 695 n.1 (dissenting opinion) (citing examples where public display of crosses on public property were struck down.)

Even if government action is noncoercive because it is "within the realm of flexible accommodation or passive acknowledgment of existing symbols," it may violate the Establishment Clause if "it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." *County of Allegheny*, 492 U.S. at 662-63 (Kennedy, J., concurring in the judgment in part and dissenting in part). There is simply no historical basis for allowing a solitary, purely religious symbol to be displayed right at the seat of government. Indeed, even religious displays associated with a holiday season were not part of the cultural norm at the time the First Amendment was considered or ratified. *See Lynch*, 465 U.S. at 720-25 (dissenting opinion).

Undeniably, when the Establishment Clause was ratified, religion was an integral part of American society. The Establishment Clause, however, was intended to prevent the entanglement of government with religion, including the establishment of religion by some of the states. See generally Leonard W. Levy, The Establishment Clause (1994); *County of Allegheny*, 492 U.S. at 646 n. 1 (Stevens, J., concurring in part and dissenting in part).

Although "historical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action," *Lynch*, 465 U.S. at 718 (dissenting opinion), the Court has upheld publicly supported religious

activities when "[t]he Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673. Thus, the Court upheld a state legislature's use of official chaplains to give prayers at the opening of legislative sessions in part because the Framers of the Establishment Clause enacted their own legislation providing for paid chaplains. *Marsh v. Chambers*, 403 U.S. 783 (1983). The Framers, however, did not contemplate the display of a Latin cross at the seat of government. Even in the pervasively Christian climate of Colonial America, the historical record is devoid of any references to a tradition of the public display of crosses or other religious symbols at government buildings. For example, there were no religious symbols on government buildings in Williamsburg, Virginia, during the Colonial era.[9] Marcus Whiffen, The Public Buildings of Williamsburg: Colonial Capitol of Virginia: An Architectural History (1958) (a leading scholarly review containing photographs, drawings, and diagrams depicting public buildings, including government buildings.) Indeed, the public display of religious symbols generally was "strongly discouraged." Dell Upton, Holy Things and Profane: Anglican Parish Churches in Colonial Virginia 119 (1986). This is consistent with the lack of public religious displays, even those commemorating holidays, during that time period. *See Lynch*, 465 U.S. at 720 (dissenting opinion). *See also County of Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in judgment in part and dissenting in part) ("[D]isplays commemorating religious holidays were not commonplace in 1791.").

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[9] This is significant because Virginia was the historical crucible of the First Amendment. Anson P. Stokes and Leo Pfeffer, Church and State in the United States 65 (1964).

There is no long-standing tradition of erecting unattended religious displays on government property. Thus, allowing such a display would appear to confer a benefit on religion by proselytizing. Undoubtedly, religion benefits from the display at the seat of government of a purely religious symbol unassociated with any holiday season; but the Establishment Clause prohibits such a benefit. *See County of Allegheny*, 492 U.S. at 601 n.51 ("[P]rohibiting the display of a creche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.").

IV. THE EQUAL ACCESS CASES OF *WIDMAR*, *MERGENS*, AND *LAMB'S CHAPEL* CAN BE DISTINGUISHED FROM THE PRESENT CASE AND THEREFORE ARE NOT CONTROLLING.

The court below relied heavily on the so-called "equal access" line of cases. *See Widmar*; *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); and *Lamb's Chapel*. However, these cases are distinguishable for four reasons.

First, as noted earlier, the Court in these cases did not focus entirely on the nature of the forum, as did the court below. Thus, in *Widmar*, the Court held that the University of Missouri at Kansas City was precluded from denying access to a religious group to use its facilities when the university had previously provided an equal access policy for its facilities for over one hundred other student groups of all types. The Court focused on the second prong of the

tripartite *Lemon* test, whether the university's action had the primary effect of advancing religion, and found that "[i]n this context, we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." *Id.* at 273 (emphasis added) (citing *Nyquist*, 413 U.S. at 771).

Similarly, in *Mergens*, the Court analyzed the constitutionality of the Equal Access Act, 20 U.S.C. §§ 4071-4074. In holding that the Act did not violate the Establishment Clause, the Court stated that "although a school may not itself lead or direct a religious club, a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion." *Id.* 496 U.S. at 253. In *Lamb's Chapel*, the latest in the equal access line of cases, the Court ruled that the school district's denial of a church group's request to use school facilities to show a religious film violated the group's free speech rights:

> The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

Lamb's Chapel, 113 S. Ct. at 2148. Thus, while the public nature of the forum was a factor, it was not automatically determinative.

Second, the Court took special care under its analysis in *Mergens* to note that the Act expressly limited participation by school officials at the religious meetings and that any such meeting was not to be held during "noninstructional time". Further, in *Lamb's Chapel,* the Court emphasized that the religious films were to be shown on a voluntary basis and were to take place after regular school hours. The Court, in making these observations, focused on the fact that a reasonable observer would not see the religious meetings as government support or endorsement of religion. The reasonable observer would know that the schools had previously opened their facilities to various civic and recreational groups *after regular school hours* and that the religious gatherings were merely an attempt by the schools to allow the religious organizations equal access to school facilities.

In contrast, in this case, the Latin cross, the universal "symbol" of the Christian faith, stood in constant vigil conveying its religious, sectarian message. It did so linked in the observer's eye with the symbol of state government, in full public view on Capitol Square, located at the busiest intersection in the state capital. There was little present to dilute the pervasively strong message that the combination of these symbols of church and state conveyed to onlookers.

Third, in the equal access cases, the school facilities had been opened to numerous other social, civic, and recreational *groups*. However, very few *unattended* structures have been permitted on the Square. The record indicates that the only unattended display that had ever been permitted on Capital Square (other than the holiday seasonal

display) was a United Way fund raising "Thermometer." The Court should again note that Respondents' witness, Joseph Cooper, viewed the United Way "Thermometer" as a symbol of state support for the United Way. (J.A.161).

Finally, failing to allow equal access in the above cases would have demonstrated hostility to religion by removing the topic of religion itself from facilities that were otherwise open to all. In those cases it would have been perceived as hostility if religion were singled out as the only subject not granted access. In this case, there is virtually no history of unattended displays on Capitol Square. The public, therefore, would not perceive denial of the cross display as singling out religion for hostile treatment.

At least two circuit courts of appeals have distinguished the equal access line of cases from cases involving unattended religious displays. In *Kaplan*, the court noted that "here, unlike in *Widmar*, the City's equal-access policy is incompatible with the Establishment Clause" because "the City's permission to display an unattended, solitary religious symbol in City Hall Park, given that Park's close association with the seat of city government", confers the imprimatur of state approval on religious practices. 891 F. 2d at 1030. *See also Chabad-Lubavitch of Vt.*, 936 F. 2d at 112 (Second Circuit held *Mergens* "is factually distinguishable ... for the same reason that its predecessor [*Widmar*] was distinguishable from *Kaplan*: it involved an open forum, with live speakers, in a public university.") Similarly, the Fourth Circuit held:

> In *Widmar*, the Supreme Court found that no imprimatur of state approval would be transmitted through an open access policy in that case. But here, because of the nature, size, location, and duration of the display, and

> its relation to the symbolic center of government, the appearance of a government imprimatur upon certain religious ideologies is present.

Albermarle County, 895 F. 2d at 959 n. 6 (quoting *Lindstrom*, 699 F. Supp. at 565). This Court should agree that the equal access cases are inapposite.[10]

V. GOVERNMENT HAS A COMPELLING INTEREST TO AVOID VIOLATING THE ESTABLISHMENT CLAUSE, AND THE MOST NARROWLY TAILORED MANNER TO ACHIEVE THAT GOAL IN THIS CASE IS AN OUTRIGHT BAN ON THE RELIGIOUS DISPLAY AT ISSUE.

The First Amendment right of free speech is a cherished doctrine. The freedom of individuals to address their thoughts to others is a hallmark of our democracy which sets the United States apart from many other countries in the world. But like all other rights, the First Amendment is not absolute. It does not mandate that all speech must be required at all times, in all forums, or under any and all

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[10] Furthermore, the Court has treated the equal access cases and seasonal display cases as analytically separate. The Court has held that the former applies to speakers who seek access for themselves to conduct meetings or similar events in facilities that have been opened for general use by the public, while simply treating its decisions concerning holiday seasonal displays as distinct without real discussion. *See, e.g., Mergens*, 496 U.S. at 249; *cf. County of Allegheny*, 492 U.S. at 600 n.50 (noting that the relationship between these two lines of doctrine has not yet been considered or resolved).

circumstances. Restrictions on speech may be validly imposed if a compelling governmental interest exists for such restrictions. *Lamb's Chapel*, 113 S. Ct. at 2148 ("[T]he interest of the state in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment....") (quoting *Widmar*, 454 U.S. at 271).

The court below found that in a public forum, the right of freedom of speech is such that no symbol conveying speech can be excluded because of its content. The court obviously was swayed by the power of the fundamental right of freedom of speech. Indeed, freedom of speech is so ingrained in American justice and culture that the framers of our Constitution listed it before all other rights preserved in the Bill of Rights -- save one: the prohibition of government involvement in religion. There is no more compelling reason than a violation of another, at least equally prominent, provision of the Constitution to justify a restriction on speech. *Widmar*, 454 U.S. at 271.

Of course, the limitation justified by a compelling governmental interest must also be narrowly tailored to avoid sweeping too broadly. But here, a complete ban on unattended solitary religious symbols is the narrowest manner in which to achieve the State's goal.

Respondents attempted to place a disclaimer on the cross. But such disclaimer was entirely ineffectual as it was small and buckled in the wind. Moreover, such disclaimer could not easily be seen from cars, by pedestrians passing by, and certainly could not be seen or understood from the many tall office buildings surrounding the Capital Square Plaza. Nor was the disclaimer necessarily understood by children, the non-English speaking, or the illiterate. Yet in comparison, from any distance or angle, none of the

individuals mentioned above could have had any difficulty understanding the message of the cross.

More importantly, requiring the private sponsor to place a disclaimer at the display, or requiring the government itself to place a disclaimer every time it authorizes a display of this type, will not remedy an Establishment Clause violation. A disclaimer does not effectively neutralize the appearance of government endorsement. The juxtaposition of the cross with the statehouse is a setting that conveys an overwhelming message of endorsement, one that no disclaimer can affectively mute. *See Stone v. Graham* 449 U.S. 39, 41 (1980) (even an explanatory plaque cannot prevent the invalidity of a posting of the Ten Commandments on school room walls); *Albemarle County*, 895 F.2d at 958 ("It remains to be seen whether any disclaimer can eliminate the patent aura of government endorsement of religion. In effect, such an aura defeats [the government's] attempt to argue for a remedial measure short of total removal of the creche.")

The most powerful symbol of Christianity, placed in conjunction with the most prominent symbol of government, the Statehouse, is simply too powerful a message of government endorsement to be effectively neutralized by a disclaimer. *See Albermarle County*, 895 F.2d at 960 ("Given a compelling state interest to remove any suggestion of governmental endorsement of religion, the district court found the most narrowly tailored means available to be outright exclusion. ... If a disclaiming sign is not sufficient to alter the message of endorsement, it is paradoxical to conclude that requiring such a disclaimer serves as a more narrowly tailored regulation.")

Even if a disclaimer could be effective under some circumstances, it raises its own Establishment Clause

problems. In order to ensure a disclaimer's effectiveness, the government will either have to negotiate with the private group over the language to include in the sign, or design its own sign. Assisting the private group in designing a disclaimer that explains both the sponsorship of the display and the government's lack of involvement with the display will only lead to the government entangling itself in the affairs of a religious group.

Requiring the government to place its own disclaimer is even more problematic. There is a fine line between non-approval and disapproval in the minds of many people. A sign that communicates the government's complete non-involvement could be interpreted as being hostile to religion. A sign declaring the Statehouse lawn to be a public forum and thereby disassociating the government from any displays is at best confusing, and at worst misleading.

The government also cannot separate itself from the display's religious message by means other than a sign. Holding press conferences and issuing press releases cannot entirely negate the display's message. Many of the people who visit the Statehouse are not residents of Columbus and would not be aware of the media attention. Furthermore, even residents of Columbus may have no more than a passing familiarity with the issue or may even misconstrue the media's attention. A likelihood exists that the more government attempts to disassociate itself from the display, the more someone will connect the two. *See Kaplan*, 891 F. 2d at 1030 (Court relied on testimony by the City Attorney that "last year we had to say that [the menorah was not sponsored by the City] so often that it became ours in some people's minds.").

Both courts below concluded that the prospect for confusion among the public concerning the sponsor of the

cross was minimized by publicity detailing the State's opposition. But First Amendment rights should not hinge on the interest the media takes in an issue. A press release saying that government had nothing to do with a cross put up by a church would be of no benefit if the media did not find the story newsworthy. It also is illogical for cases such as this to turn on the degree of the government's opposition. In essence, the rule fashioned by the courts below would inform the government that the more it opposed a particular display and the more publicity that opposition generated, the greater the likelihood that the state would be required to permit the display.

The State has a compelling interest to avoid the blending of the cross' message with the government's. Neither a disclaimer nor publicity can separate the two when linked by their most recognized symbols. Because the display at issue links the Latin cross with the State Capitol, this Court must find a violation of the Establishment Clause.

CONCLUSION

For the reasons set forth, this Court should reverse the decision of the court below.

Respectfully submitted,

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